

KEVIN J. SENN (SBN 136226)
SUSAN D. CONDON (SBN 143417)
ARMSTRONG TEASDALE LLP
Three Embarcadero Center, Suite 2310
San Francisco, CA 94111-4039
Telephone: (415) 433-1500
Facsimile: (415) 433-1508
Email: ksenn@armstrongteasdale.com
Email: scondon@armstrongteasdale.com

Attorneys for Defendant
SHOP-VAC CORPORATION

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

RICHARD A. SILBER, an individual and on behalf of all others similarly situated,

Plaintiff,

vs.

SHOP-VAC CORPORATION, a
Pennsylvania Corporation, and DOES 1
through 100, inclusive

Defendants.

CASE NO. 3:08CV00637-JLS (RBB)

**NOTICE OF MOTION AND MOTION TO
STRIKE IMMATERIAL AND
IMPERTINENT STATEMENTS FROM
COMPLAINT (FRCP RULE 12 (F))**

DATE: July 18, 2008

TIME: 10:30 AM

COURTROOM: 6

Hon. Janis L. Sammartino

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT ON Friday, July 18, 2008, or as soon thereafter as the matter may be heard in Courtroom 6 of the above-entitled Court, located at 940 Front Street, San Diego, California, Defendant SHOP-VAC CORPORATION will move the Court pursuant to Rule 12(f), Fed. R. Civ. Pro. to strike portions of Plaintiff's Complaint on the grounds that such statements are immaterial and/or impertinent and have no essential or important relationship to the claims for relief or they do not pertain and are not necessary to the issues in question. Specifically, Shop-Vac moves to strike the following:

- Item 1 of Plaintiff's prayer seeking damages (p. 14:12-13): "Damages according to proof as to the third cause of action. (See *Colgan v. Leatherman Tool Group, Inc.* (sic) Cal.App.4th 663, 696 (2nd Dist. 2006));"
 - Reference to receipt and recovery of "ill-gotten gains" as described in ¶ 45 of the Complaint and Item 5 of Plaintiff's Prayer. Specifically, Shop-Vac moves to strike: "by the receipt of ill-gotten gains" (p.12: 18-19); "of the ill-gotten gains as set forth in the analysis contained in the seminal case of *Colgan v. Leatherman Tool Group, Inc.* (2006) (sic) Cal.App.4th 663 and" (p. 12:20-22); and "with all ill-gotten monies acquired by means of Defendant's unfair competition, which is measured by the analysis contained in the seminal case of *Colgan v. Leatherman Tool Group, Inc.* (2006) (sic) Cal.App.4th 663" (p.14: 23-26).

This Motion is submitted simultaneously and in the alternative with Defendant's Motion to Strike pursuant to Rule 12 (b)(6), Fed. R. Civ. Proc. This Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the pleadings on file with the Court, and such argument as may be presented at the hearing on the Motion.

Dated: April 29, 2008

ARMSTRONG TEASDALE LLP

By: /s/ Susan D. Condon

Attorney for Defendant SHOP-VAC
CORPORATION
Email: scondon@armstrongteasdale.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically this **29th day of April, 2008** with the Clerk of the USDC Southern District of California (San Diego) to be served by operation of the Court's ECF electronic filing system upon the following:

John H. Donboli
JL Sean Slattery
DEL MAR LAW GROUP LLP
322 Eighth Street, Suite 101
Del Mar, CA 92014
Telephone (858) 793-6244
Facsimile (858) 793-6005
Email: jdonboli@delmarlawgroup.com
Attorneys for Plaintiff Richard A. Silber

By: /s/ Susan D. Condon

Attorney for Defendant SHOP-VAC
CORPORATION
Email: scondon@armstrongteasdale.com